A **PORAVIAPPAN ARUNASALAM PILLAY (SEBAGAI PENTADBIR HARTA PESAKA NADARAJAH SITHAMBARAM PILLAI) v. PERIASAMY SITHAMBARAM PILLAI & ANOR**

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
B ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
RAMLY ALI FCJ
[CIVIL APPEAL NO: 02(F)-6-02-2013(A)]
C 17 JUNE 2015

CIVIL PROCEDURE: *Interpleader – Stakeholder's interpleader – Pre-condition to be fulfilled in commencing interpleader proceeding – Whether applicant was being sued or expected to be sued by persons making adverse claims – Whether fulfilled*
D *criteria under O. 17 r. 1(a) of Rules of the High Court 1980*

CIVIL PROCEDURE: *Parties – Action against estate of deceased – Appointment of person to represent deceased estate in court proceedings – Whether person appointed as representative had authority to enter into consent order binding upon estate of deceased – Rules of the High Court 1980, O. 15 r. 6A(4)(a)*

E

CIVIL PROCEDURE: *Pleadings – Parties bound by pleadings – Failure to plead material facts – Whether plaintiff allowed to succeed and obtain judgment on unpleaded issues*

On 18 February 1982, one Nadarajah ('deceased') entered into a sale and
F purchase agreement ('the agreement') with one Ponnamal to sell a piece of land ('the said land'). The deceased received RM420,000 as deposit and part payment from Ponnamal before he passed away on 20 August 1982. The deceased, amongst others, left behind his mother ('Datin Sellayee'), a brother ('the first defendant') and a nephew ('Dr Shan'). Datin Sellayee was the sole
G beneficiary of the estate of the deceased. On 1 October 1982, Datin Sellayee died leaving her entire estate to Dr Shan in her will. Acting on a power of attorney granted to the plaintiff by Dr Shan, the plaintiff applied for letters of administration ('LA') of the deceased's estate which was granted by the court. However, the plaintiff was prevented from extracting the LA by a
H caveat entered by the first defendant. The first defendant then applied and obtained a grant of probate for the deceased based on a purported will appointing him as the executor and sole beneficiary of the deceased's estate. The plaintiff lodged a caveat against the grant of probate and also obtained an *ex parte* injunction against the first defendant, preventing him from acting for the deceased's estate. Meanwhile, Ponnamal filed originating summons
I ('OS') against the deceased's estate seeking for specific performance of the agreement. In that action, Ponnamal named her former solicitor,

one Seeralan as the second defendant as he was the stakeholder of the document of title to the said land and the memorandum of transfer duly executed by the deceased. Ponnamal's application for an order that the first defendant be appointed to represent the deceased's estate was granted by the court. Ponnamal proceeded with the hearing of the OS and a consent order ('the consent order') was recorded. Under the consent order, the first defendant had to execute all relevant transfer forms to transfer the said land to Ponnamal or her nominees. The plaintiff responded by filing a civil suit ('suit 2087') against the first defendant and prayed for, *inter alia*, the following orders: (i) a declaration that the consent order was null and void; and (ii) a declaration that the agreement was a sham, void and unenforceable. When Ponnamal passed away on 25 November 1988, her estate was represented by her two children and they were the second defendants in suit 2087. On 17 February 1997, the Federal Court declared that the will of the deceased upon which the first defendant obtained an order of probate was a forgery and was null and void. The probate was then revoked. The plaintiff then succeeded in extracting his LA. The issues raised in suit 2087 were: (i) that the agreement was a sham to cover-up a money lending transaction which was not enforceable since Ponnamal was not a licensed money lender; and (ii) that the consent order was a nullity and ought to be set aside. The High Court dismissed the plaintiff's claim and the plaintiff's appeal to the Court of Appeal was also dismissed. Hence, the plaintiff was granted leave to bring the present appeal in the Federal Court on the following questions: (i) whether a valid consent could be given for the sale of a deceased's property by an executor appointed under a will that was subsequently declared by the court to be a forgery (ii) whether the approval given by the court to a consent order for the sale of estate property was valid when pending interpleader summons challenging the genuineness of the sale was not brought to the attention of the court (iii) and whether the official administrator could validly consent to the sale of the deceased's property under ss. 39 and 60 of the Probate and Administration Act 1959 without an empowering court order. The interpleader summons in question had been taken out in the OS suit by Ponnamal's solicitor, Seeralan, wherein he had challenged the agreement as not being a genuine sale, claiming that it was in fact a disguise for a money lending transaction. The interpleader summons was never adjudicated or dismissed. The plaintiff contended that since the interpleader summons was not brought to the attention of the judge, the consent order had been obtained without deciding whether the sale was a genuine sale.

Held (dismissing appeal with costs)
Per Ahmad Maarop FCJ delivering the judgment of the court:

(1) The first defendant consented to the consent order as a representative of the deceased under O. 15 of the Rules of the High Court 1980 ('RHC'). The first defendant had not consented to the consent order as an executor

A but was vested with the power to bind the deceased's estate by the order of the High Court appointing the first defendant as the representative of the deceased's estate pursuant to O. 15 r. 6A of the RHC. Under O. 15 r. 6A(4)(a) of the RHC, for such a person to be appointed there was no requirement that a probate or LA to have been granted. The B consent order against the deceased's estate which was properly represented by the first defendant as the duly appointed legal representative of the deceased's estate was properly obtained and was enforceable against the deceased's estate. (para 33)

(2) Interpleader summons as provided under O. 17 r. 1(a) of the RHC, is C the provision for what is styled as stakeholder's interpleader, which was the applicable provision in the context of the present case. As provided by O. 17(1)(a) of the RHC, the state of being sued or the expectation to be sued in respect of those goods "by two or more persons making adverse claims", is the pre-condition which the applicant must fulfil to D give the court the jurisdiction to exercise discretion to grant the relief provided under O. 17 of the RHC. There must be some real foundation for such expectation. (para 65)

(3) Seeralan was not seeking for interpleader relief as a person who was vexed by suits from two or more person making adverse claims. What E he wanted the court to do was to investigate and adjudicate whether the sale was a mere money lending transaction. This could not be a ground for an interpleader application. Seeralan had failed to fulfil the pre-condition under O. 17 r. 1(a) of the RHC that he was being sued or expected to be sued by two or more persons making adverse claims. F Thus, the interpleader application was not proper pursuant to O. 17 of the RHC. (para 68)

(4) The focus of the second leave question was not the averment that the sale was a sham money lending transaction itself, but the non-disclosure of the interpleader summons filed by Seeralan. The issue of whether the G sale was a sham money lending transaction was adjudicated in the trial before the High Court which concluded that the plaintiff had failed to prove on the balance of probability that the agreement was a sham transaction for the cover up of an illegal money lending transaction. In arriving at that conclusion the High Court Judge had, duly considered H Seeralan's allegation in his affidavit that the sale was a cover-up for a money lending transaction. The non-disclosure of the interpleader summons as a ground of challenge to the validity of the consent order was an indirect way of reviving or relitigating the issue of whether the sale was a sham money lending transaction which had been decided by I the High Court. The non-disclosure of the interpleader summons was never pleaded by the plaintiff as a ground in seeking to nullify and set aside the consent order. Since this issue and the material facts to support

it were not pleaded by the plaintiff in his amended statement of claim, the plaintiff could not be allowed to succeed and obtain judgment on it on appeal. Hence, it was not necessary to answer the second question. (para 72)

Bahasa Malaysia *Translation Of Headnotes*

Pada 18 Februari 1982, Nadarajah ('si mati') telah memasuki satu perjanjian jual beli ('perjanjian') dengan satu Ponnamal untuk menjual sebidang tanah ('tanah tersebut'). Si mati telah menerima RM420,000 sebagai deposit dan pembayaran sebahagian daripada Ponnamal sebelum dia meninggal dunia pada 20 Ogos 1982. Si mati, antara lain, telah meninggalkan ibunya ('Datin Sellayee'), seorang abang ('defendan pertama') dan seorang anak saudara ('Dr Shan'). Datin Sellayee merupakan benefisiari tunggal harta pusaka si mati. Pada 1 Oktober 1982, Datin Sellayee telah meninggal dunia dan meninggalkan keseluruhan harta pusakanya kepada Dr Shan dalam wasiatnya. Bertindak atas surat kuasa wakil yang diberikan kepadanya oleh Dr Shan, plaintif memohon surat kuasa mentadbir ('SKM') bagi harta pusaka si mati yang diberikan oleh mahkamah. Walau bagaimanapun, plaintif telah dihalang daripada mengekstrak SKM oleh satu kaveat yang dimasukkan oleh defendan pertama. Defendan pertama kemudian memohon dan memperolehi geran probet untuk si mati berdasarkan wasiat yang melantiknya sebagai wasi dan benefisiari tunggal harta pusaka si mati. Plaintif memasukkan kaveat terhadap geran probet dan juga memperolehi satu injunksi *ex parte* terhadap defendan pertama menghalangnya dari bertindak untuk harta pusaka si mati. Di samping itu, Ponnamal telah menfailkan saman pemula ('SP') terhadap harta pusaka si mati menuntut pelaksanaan spesifik perjanjian. Dalam tindakan tersebut, Ponnamal menamakan bekas peguamnya, Encik Seerelan sebagai defendan kedua kerana dia merupakan pemegang amanah dokumen hak milik bagi tanah tersebut dan memorandum pindah milik yang telah dilaksanakan oleh si mati. Permohonan Ponnamal bagi perintah bahawa defendan pertama dilantik untuk mewakili harta pusaka si mati telah dibenarkan oleh mahkamah. Ponnamal meneruskan dengan perbicaraan SP dan perintah persetujuan ('perintah persetujuan') telah direkodkan. Di bawah perintah persetujuan, defendan pertama harus memeterai kesemua borang-borang pindahmilik untuk memindahkan tanah tersebut kepada Ponnamal atau penama-penamanya. Plaintif telah membalas dengan memfailkan satu guaman sivil (guaman sivil 2087) terhadap defendan pertama dan menuntut, antara lain, perintah-perintah berikut: (i) satu pengisytiharan bahawa perintah persetujuan tersebut adalah terbatal dan tidak sah; (ii) satu pengisytiharan bahawa perjanjian tersebut adalah satu penipuan dan terbatal dan tidak boleh dikuatkuasakan. Apabila Ponnamal meninggal dunia pada 25 November 1988, harta pusakanya telah diwakili oleh dua orang anaknya dan mereka adalah defendan-defendan kedua dalam guaman sivil 2087. Pada 17 Februari 1997, Mahkamah Persekutuan mengisytiharkan bahawa wasiat si mati di mana defendan pertama memperolehi geran probet adalah palsu dan terbatal dan tidak sah. Probet tersebut kemudian dibatalkan. Plantif

A kemudian berjaya mengekstrak SKMnya. Isu-isu yang dibangkitkan dalam guaman sivil 2087 adalah: (i) bahawa perjanjian adalah satu penipuan untuk menutup transaksi pinjaman wang yang tidak boleh dikuatkuasakan kerana Ponnamal bukan merupakan peminjam wang berlesen; dan (ii) bahawa perintah persetujuan adalah tidak sah dan sepatutnya diketepikan. B Mahkamah Tinggi telah menolak tuntutan plaintif dan rayuan plaintif di Mahkamah Rayuan juga telah ditolak. Oleh itu, plaintif telah diberi kebenaran untuk membawa rayuan ini ke Mahkamah Persekutuan berdasarkan soalan-soalan berikut: (i) sama ada persetujuan sah boleh diberikan bagi penjualan harta si mati oleh wasi yang dilantik di bawah satu C wasiat yang kemudiannya diisytiharkan oleh mahkamah sebagai palsu (ii) sama ada kebenaran yang diberikan oleh mahkamah untuk perintah persetujuan bagi penjualan harta pusaka adalah sah apabila saman interplider bagi mencabar kesahihan penjualan yang tergantung tidak dibawa ke perhatian mahkamah (iii) sama ada pegawai pentadbir pusaka boleh secara sahnya memberi persetujuan bagi penjualan harta si mati di bawah ss. 39 dan D 60 Akta Probet dan Pentadbiran 1959 tanpa suatu perintah berkuasa mahkamah. Saman interplider berkenaan telah dikemukakan dalam SP oleh peguam Ponnamal, Seeralan, di mana dia telah mencabar perjanjian tersebut sebagai penjualan yang tidak sahih, dengan mendakwa bahawa sebenarnya, ia adalah satu samaran untuk transaksi pinjaman wang. Saman interplider E tidak pernah diisytiharkan atau ditolak. Plaintif menghujahkan bahawa oleh kerana saman interplider tidak dibawa kepada perhatian hakim bicara, perintah persetujuan telah diperolehi tanpa menentukan sama ada penjualan adalah penjualan yang sahih.

F **Diputuskan (menolak rayuan dengan kos)**
Oleh Ahmad Maarop HMP menyampaikan penghakiman mahkamah:

(1) Defendan pertama bersetuju dengan perintah persetujuan sebagai wakil si mati di bawah A.15 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KKMT'). Defendan pertama tidak memberi persetujuan terhadap perintah persetujuan sebagai wasi tetapi mempunyai kuasa untuk G mengikat harta pusaka si mati melalui perintah Mahkamah Tinggi untuk melantik defendan pertama sebagai wakil harta pusaka si mati mengikut A. 15 k. 6A KKMT. Di bawah A. 15 k. 6A(4)(a) KKMT untuk seseorang dilantik, probet atau SKM tidak perlu diberikan. Perintah persetujuan terhadap harta pusaka si mati yang telah dengan betul H diwakili oleh defendan pertama sebagai wakil harta pusaka yang sah telah diperolehi dan dikuatkuasakan terhadap harta pusaka si mati.

(2) Saman interplider sebagaimana yang diperuntukkan di bawah A. 17 k. 1(a) KKMT, adalah peruntukan untuk apa yang dikenali sebagai I interplider pemegang amanah, sepertimana peruntukan yang digunapakai dalam konteks kes ini. Seperti yang diperuntukkan oleh A. 17 k. (1)(a) KKMT 80, keadaan apabila disaman atau jangkaan untuk disaman ke atas barangan tersebut "oleh dua atau lebih orang yang

membuat tuntutan bertentangan", adalah pra-syarat di mana pemohon perlu memenuhi untuk memberi mahkamah kuasa untuk melaksanakan budi bicara bagi memberikan relif yang diperuntukkan di bawah O. 17 KKMT. Perlu adanya beberapa asas sebenar untuk jangkaan tersebut.

(3) Seeralan tidak memohon relif interplider sebagaimana orang yang dirunsingkan oleh saman daripada dua atau lebih orang yang membuat tuntutan berlainan. Apa yang dia ingin mahkamah lakukan adalah untuk menyiasat dan mengadili sama ada penjualan tersebut adalah transaksi pinjaman wang semata-mata. Ini tidak boleh dijadikan alasan untuk permohonan interplider. Seeralan gagal untuk memenuhi pra-syarat di bawah A. 17 k. 1(a) KKMT bahawa dia telah disaman atau dijangka untuk disaman oleh dua atau lebih orang yang membuat tuntutan berlainan. Oleh itu, permohonan interplider adalah tidak betul menurut A. 17 KKMT.

(4) Fokus bagi persoalan kebenaran kedua bukanlah pernyataan bahawa penjualan tersebut adalah transaksi pinjaman wang tidak sah tetapi ketakdedahan saman interplider yang difailkan oleh Encik Seeralan. Isu sama ada penjualan tersebut adalah transaksi pinjaman wang tidak sah telah diputuskan dalam perbicaraan di hadapan Mahkamah Tinggi yang membuat kesimpulan bahawa plaintif gagal untuk membuktikan atas imbangan kebarangkalian bahawa perjanjian tersebut adalah transaksi tidak sah untuk menutup transaksi pinjaman wang haram. Dalam mencapai keputusan, hakim bicara Mahkamah Tinggi telah menimbang dakwaan Seeralan dalam afidavitnya bahawa penjualan tersebut adalah untuk menutup transaksi pinjaman wang. Ketakdedahan saman interplider sebagai alasan untuk mencabar kesahihan perintah persetujuan adalah secara langsung satu cara untuk menghidupkan semula atau membuat litigasi semula isu sama ada penjualan tersebut adalah transaksi pinjaman wang tidak sah sepertimana yang telah diputuskan oleh Mahkamah Tinggi. Ketakdedahan saman interplider tidak pernah dituntut oleh plaintif sebagai alasan dalam memohon untuk membatalkan dan mengetepikan perintah persetujuan tersebut. Oleh kerana isu ini dan fakta material untuk menyokongnya tidak dituntut oleh plaintif dalam penyataan tuntutan terpinda, plaintif tidak boleh dibenarkan untuk berjaya dan memperolehi penghakiman ke atas rayuannya. Oleh itu, adalah tidak perlu untuk menjawab soalan kedua.

Case(s) referred to:

Ambank (M) Bhd v. Luqman Kamil Mohammed Don [2012] 3 CLJ 551 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bauer (M) Sdn Bhd v. Daewoo Corporation [1999] 4 CLJ 665 CA ***(refd)***

Birch v. Birch [1902] P 130 ***(refd)***

Canara Bank v. Canara Sales Corporation and Ors AIR 1987 SC 1603 ***(refd)***

Chan Kit San v. Ho Fung Hang [1902] AC 257 ***(refd)***

A *Chay Chong Hwa & Ors v. Seah Mary [1986] 1 LNS 68 PC* ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Hj Osman Abu Bakar v. Saiyed Noor Saiyed Mohamed [1952] 1 LNS 33 HC ***(refd)***
Jamaliah Hj Mahsudi (Suing On Her Own Behalf And As Administratrix Of The Estate
B *Of Salamah Hj Ali) & Ors v. Sivam Munsamy & Anor [1998] 1 LNS 362 HC* ***(refd)***
Jigarlal Kantilal Doshi v. Amanah Raya Bhd [2011] 9 CLJ 361 FC ***(refd)***
KALRM Karuppan Chettiar v. Subramanian Chettiar The Official Administrator, And Palaniappa Chettiar And Muthukarupaan Chettiar [1930] 1 LNS 1 HC ***(refd)***
Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***
Kersah La'uisn v. Sikin Menan [1964] 1 LNS 57 HC ***(refd)***
C *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC* ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Lim Cheng Kwang v. Sivamalai Sinnathambi & Anor [1994] 2 CLJ 59 HC ***(refd)***
D *Meek v. Fleming [1961] 3 All ER 148* ***(refd)***
Meyappa Chetty v. Supramaniam Chetty [1916] 1 AC 603 PC ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v. Sin Yoong Ming [2015] 1 CLJ 1 FC ***(refd)***
Pundit Prayrag Raj v. Goukaran Pershad Tewari 6 CWN 787 ***(refd)***
E *Selvarajah & Anor v. Official Administrator & Anor [1978] 1 LNS 246 HC* ***(refd)***
Sheriffa Shaikhah v. Ban Hoe Seng & Co Ltd [1963] 1 LNS 125 HC ***(refd)***
Shripadgouda v. Govindgouda, AIR 1941 Bomb 77 ***(refd)***
SP Chengalvaraya Naidu v. Jaganath AIR 1994 SC 853 ***(refd)***
Tetuan Teh Kim Teh, Salina & Co v. Tan Kau Tiah & Anor [2013] 5 CLJ 161 FC ***(refd)***
Yong Siew Choon v. Kerajaan Malaysia [2003] 2 CLJ 106 CA ***(refd)***

F **Legislation referred to:**
Evidence Act 1950, ss. 40, 41, 42, 44
Probate and Administration Act 1959, ss. 2, 39(1), 60(1), (4)
Rules of the High Court 1980, O. 15 r. 6A(4)(a), (7), O. 17 r. 1(1)(a)

For the appellant - Cyrus V Das (T Sudhar with him); M/s Shook Lin & Bok
G *For the 1st respondent - Bastian Vendargon (Annemarie Vendargon with him); M/s Dev Pillai & Co*
For the 2nd respondent - Malik Imtiaz Sarwar (Pavendeep Singh, Ramesh Kanapathy & Lee Sit Cheng with him); M/s Chellam Wong

[Editor's note: For the Court of Appeal judgment, please see Poraviappan Arunasalam
H *Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor [2011] 1 LNS 1744 (affirmed).]*

Reported by Amutha Suppayah

I

JUDGMENT

Ahmad Maarop FCJ:

[1] For convenience, in this judgment the parties will be referred to as they were in the High Court.

[2] The background facts leading to the present appeal are these. On 18 February 1982, Nadarajah s/o Dato' Sithambaram (deceased) entered into a sale and purchase agreement ('the agreement') with one Madam ('Mdm') Ponnamal d/o Ramasamy to sell the land held under Grant No. 12359 Lot 1631 Mukim Teluk Bharu, in the State of Perak, measuring approximately 306 acres ('the said land'). The purchase price of the said land stated in the agreement was RM3 million out of which the deceased acknowledged receipt of RM420,000 as a deposit and part payment from Mdm Ponnamal. The completion date of the agreement was 18 December 1982 subject to the approval of the Foreign Investment Committee (FIC).

[3] On 20 August 1982, the deceased passed away. He left behind an aged mother named Datin Sellayee Ammal, a brother ('the first defendant'), two sisters, and a nephew named Dr Shanmuganathan ('Dr Shan'). Dr Shan's father was the elder brother of the deceased who predeceased him. On 4 September 1982 and 5 September 1982, a family meeting was held to decide on the management of the affairs of the deceased's estate. The following persons attended the meeting:

(i) the first defendant;

(ii) Mrs Thanaletchumi (one of the two sisters of the deceased);

(iii) Mr Dorairaj (representing Mrs Kamalavathy, the other sister of the deceased);

(iv) Dr Shan; and

(v) the plaintiff.

[4] The co-ordinator of the meeting was the plaintiff who also recorded the minutes of the meeting. The plaintiff was the brother-in-law of Dr Shan.

[5] According to item 2 of the minutes of the family meeting, since Datin Sellayee (the sole beneficiary of the estate of the deceased under the law) was old and was residing in India, she would be requested to renounce her entitlement to the said land in favour of the following persons:

(a) The first defendant;

(b) Mrs Kamalavathy;

(c) Mrs Thanaletchumi; and

(d) Dr Shan.

[6] Item 3 of the minutes of the meeting states that the plaintiff and Mr Dorairaj should administer the estate of the deceased. However, if the lawyers are of the opinion that only one administrator is sufficient then the plaintiff shall be the sole administrator.

[7] Item 4 of the minutes of the meeting states:

> 4. The properties that due to be administered are
>
> A) Kamachi Estate of about 129.5 Hectares consisting of 9 Grants. Of the 9 Grants the main one Lot No. 1631 of 306 acres has been transferred to Mr. Mooka Pillai, for an approximate sum of $3 million. He in turn has paid a sum of $420,000 as deposit to late Mr. S. Nadarajah and the balance of sum 2.58 million is payable on or before December 18.
>
> It has been agreed that this property be sold and the monies obtained to be used to pay the loan detained from Overseas Union Trust, for the KL building bought by the Late Mr. Nadarajah and the balance to be kept to pay the death duty.

[8] According to the minutes of the meeting, the next family meeting would be on 9 October 1982. However, this did not take place as on 1 October 1982 Datin Sellayee died, and it seemed that in her last will and testament she left the entire estate to Dr Shan. The effect of her last will is that if it is proved, then the entire estate of the deceased will go to Dr Shan. This, according to the evidence, appeared to have triggered a number of courses of action taken with regard to the deceased's estate by certain persons who attended the family meeting; which courses of action were not in line with the direction of the course of action to be taken as recorded in the minutes of the family meeting.

[9] On 8 March 1983, the first defendant petitioned for letters of administration for the deceased estate. However this was not proceeded with. On the same date, acting on a power of attorney granted to him by Dr Shan, the plaintiff applied for letters of administration of the deceased's estate which was granted by the court on 16 August 1983. On 4 October 1983, a copy of the court order was served on the first defendant. However, when the plaintiff attempted to extract letters of administration, he was prevented from doing so by a caveat entered by the first defendant.

[10] On 12 March 1984, the first defendant applied for a grant of probate in the Ipoh High Court (Case No. 152/84) insisting that the deceased had left a will appointing him as the executor and sole beneficiary of the deceased's estate. The first defendant did not disclose to the court the grant of the letters of administration to the plaintiff. On 21 August 1984, the first defendant obtained an order for probate to the deceased's estate.

[11] On 10 October 1984, the plaintiff lodged a caveat against the grant of probate to the first defendant. In addition to that, on 15 October 1984 by way of an originating motion (F54/84) the plaintiff applied for in the Kuala Lumpur High Court and obtained an *ex parte* injunction against the first

defendant preventing him from acting for the deceased's estate. The first defendant attempted to set aside that interim injunction. On 1 April 1985, LC Vohrah J (as he then was) ordered the *ex parte* injunction granted on 15 October 1984 to continue except:

(a) that the Applicant (1st Defendant) herein to continue acting as the representative of the estate of Nadarajah s/o Dato Sithambaram Pillai in the High Court Originating Summons. No. 267 of 1984 until the Official Administrator Malaysia takes over;

(b) that the Official Administrator Malaysia to take charge of all the assets of the estate of Nadarajah s/o Dato Sithambaram Pillai.

The learned judge also ordered that this action be transferred and dealt with in the Ipoh High Court.

[12] On 26 November 1985 the plaintiff, (in the capacity as Dr Shan's attorney), filed a writ against the first defendant seeking for a declaration that the will which was relied upon by the first defendant to obtain the grant of probate in respect of the deceased's estate was a forgery and was null and void, and that the grant of probate to the first defendant be revoked. As will be seen later in this judgment, the outcome of this application as declared by the Federal Court eventually on appeal, became the main plank from which the plaintiff launched his challenge to the consent order dated 31 October 1985.

[13] Meanwhile, on the part of Mdm Ponnamal, on 16 December 1982 (ie, two days before the date for the completion of the purchase of the said land), through his solicitor, Mr Seeralan, she wrote a letter to the deceased. Carbon copies of the letter were sent to the persons who attended or were represented at the family meeting on 4 September 1982 and 5 September 1982. In this letter, Mdm Ponnamal stated that she was ready and willing to proceed with the purchase of the said land by paying the balance of the purchase price except that there should be deductions for certain matters concerning the said land which were not disclosed at the time of the agreement, the major one being the Government acquisition of about 21 acres of the said land. After receiving no response, on 23 August 1983 Mdm Ponnamal, through her solicitors Messrs Nahappanpuri and Partners, wrote to the plaintiff's solicitor reiterating her desire to complete the purchase of the said land since the bank loan to finance it was in place.

[14] On 25 February 1984, Mdm Ponnamal filed Originating Summons No. 267/84 ('OS 267/84') in the Ipoh High Court against the deceased's estate seeking for specific performance of the agreement. In that action, Mdm Ponnamal named her former solicitor, Mr Seeralan as the second defendant. The reason given for roping in Mr Seeralan was that he was the stakeholder of the document of title to the said land and the memorandum of transfer duly executed by the deceased at the time of the agreement which would be required to effect the transfer of the said land to Mdm Ponnamal or her nominees. For the purpose of the proceeding in OS 267/84, Mdm Ponnamal

A applied by way of a summons in chambers for an order that the first defendant be appointed to represent the deceased's estate which order was granted by Anuar Zainal Abidin J (as he then was) on 20 April 1984.

[15] Mdm Ponnamal proceeded with the hearing of OS 267/84. On 31 October 1985 at the hearing before Ajaib Singh J (as he then was), a B consent order ('the consent order') was recorded. The order practically ordered the first defendant to execute all relevant transfer forms to transfer the said land to Mdm Ponnamal or her nominees, and upon registration of the transfer, the balance of the purchase price of RM2,370,135 (instead of RM2,760,000 as provided in the agreement) shall be paid by Mdm C Ponnamal to the first defendant's solicitor who should then put it into a fixed deposit account in trust for the estate. The consent order is as follows:

> Order
>
> This originating summons coming on this day for bearing in the presence D of of Mr. A. Iruthaya Raj of Counsel for the plaintiff, Mr. N.T. Rajah of Counsel for the 1st defendant And Mr. Karunanithi, as Assistant Official Administrator and 2nd defendant being absent and upon reading the affidavits filed herein and upon hearing Counsel as aforesaid:
>
> By consent it is ordered that the 2nd defendant do forthwith deliver the title deed relating to Grant for Land No. 12359 for Lot No. 1631 in the E Mukim of Teluk Bharu District of Lower Perak to the plaintiff's solicitors to be dealt with in accordance with the term of the order.
>
> And it is ordered that the 1st defendant do forthwith execute a withdrawal of caveat Presentation No. 1142/84 lodged by him on 14th March 1984 and deliver the same to the plaintiff's solicitors to enable the F registration of the transfer in favour of the plaintiff or her nominee or nominees.
>
> And it is ordered that the 1st defendant do forthwith execute all relevant documents, forms and returns under the Real Property Gains Tax on behalf of the estate of Nadarajah s/o Sithambaram deceased and deliver the same to the plaintiff's solicitors. G
>
> And it is also ordered that the plaintiff be at liberty to present the transfer executed by the said Nadarajah s/o Sithambaram deceased on 18th February 1982 for registration within 3 months from date of this order and that the Registrar of Titles Perak do give effect to the said transfer by making necessary memorial of transfer. H
>
> And it is also ordered that upon registration of transfer as aforesaid the plaintiff do forthwith pay the sum of $2,370,135.00 to the 1st defendant's solicitors namely Messrs Maxwell, Kenion, Cowdy & Jones and that the receipt of the said sum by the said solicitors Messrs Maxwell, Kenion, Cowdy & Jones be a valid discharge and release to the plaintiff for I payment of the said sum of $2,370,135.00 by the estate of Nadarajah s/o Sithambaram deceased.

And it is also ordered that the said Messrs Maxwell, Kenion, Cowdy & Jones shall place the said sum of $2,370,135.00 on fixed deposit in a Commercial Bank in trust for the estate of Nadarajah s/o Sithambaram deceased to be dealt with in accordance with the order of court.

And it is also ordered that the dispute relating to the sum of $209,865.00 payable under the term of the agreement dated 18.2.82 be determined at the hearing of this matter or by a separate suit filed for that purpose.

And it also ordered that the plaintiff shall go into occupation of the land upon payment of the said sum of $2,370,135.00 to the said solicitors Messrs Maxwell, Kenion, Cowdy & Jones and until then the estate of the deceased shall be entitled to all profits and income from the said land.

And it is also ordered that the parties be at liberty to apply.

Given under my hand and the Seal of the Court this 31st day of October 1985.

[16] The plaintiff responded promptly by filing in the Ipoh High Court Civil Suit No. 2087/85 against the first defendant and Mdm Ponnamal, praying for the following orders:

(1) A Declaration that the Consent Order of 31st October 1985 is a nullity and/or null and void;

(1A) A declaration that the purported Sale Agreement of 18 February, 1982 was a sham and in any event is void and unenforceable.

(1B) An Order that the Defendants and any of them do surrender and deliver the title and the transfer documents in their possession relating to the said land.

(1C) An Order for removal of the caveat entered by Ponnamal d/o Ramasamy Pillai.

(1D) Damages for Fraud and Deception against the Defendants.

(1E) Damages against the Estate of Ponnamal d/o Ramasamy Pillai for wrongful entry of caveat.

(2) An Injunction restraining the Defendants and each of them from acting on the terms of the said Order;

(3) Such further or other relief; and

(4) Costs.

[17] The first defendant and Mdm Ponnamal filed their defences. Mdm Ponnamal also counterclaimed against the plaintiff for the following: (a) the injunction granted by LC Vohrah J be discharged; (b) the caveat entered by the plaintiff on the estate be removed; (c) she be at liberty to enforce and carry into execution the consent order; (d) an inquiry into damages.

[18] When Mdm Ponnamal passed away on 25 November 1988, her estate was represented by her two children and they were the second defendants in Civil Action 2087/85. It is this civil suit which eventually found its way to this court and become the subject of the present appeal.

[19] On 17 February 1997 the Federal Court declared that the will of the deceased upon which the first defendant obtained an order of probate on 21 August 1984 in the Ipoh High Court Petition No. 152/84, was a forgery and was null and void. The Federal Court also ordered that the probate obtained from the Ipoh High Court *vide* Probate Petition No. 152 of 1984 on 21 August 1984 be revoked. (See *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61). The plaintiff then succeeded in extracting his letters of administration.

[20] On 29 October 2001, the High Court dismissed the plaintiff's claim (in the Civil Suit No. 2087/85) with cost and allowed the second defendant's counterclaim as to prayers (a), (b), (c), (e), (f), and (g).

[21] The plaintiff appealed to the Court of Appeal. On 5 March 2010, the plaintiff's appeal was dismissed with cost. The orders made by the High Court were affirmed.

[22] On 7 February 2013 this court granted the plaintiff leave to appeal on the following questions ('the leave questions'):

(a) Can a valid consent be given for the sale of a deceased's property by an executor appointed under a will that is subsequently declared by the court to be a forgery?

(b) Whether the approval given by the Court to a consent order for the sale of estate property is valid when pending interpleader summons challenging the genuineness of the sale was not brought to the attention of the court?

(c) Whether the Official Administrator could validly consent to the sale of deceased property under Section 39 and Section 60 of the Probate & Administration Act 1960 without an empowering court order?

[23] Based on the pleadings filed by the parties, two issues were raised for the determination of the High Court. The first was whether the agreement was a sham to cover-up a money lending transaction which was not enforceable since Mdm Ponnamal was not a licensed money lender. The second was whether the consent order was a nullity and ought to set aside.

[24] On the first issue, upon consideration of the evidence presented before it the High Court found that the plaintiff had failed to prove on the balance of probabilities that the agreement was a sham transaction and a cover-up of an illegal money lending transaction. The learned trial judge gave several reasons to support his findings. This is what the learned trial judge said in his judgment:

1. I do not find the terms and conditions stipulated in the S & P Agreement unusual to give rise to any suspicion that it was intended for a money lending transaction. Though the provision for payment of the balance of the purchase price is not within the period of 3 to 4 months after the date of execution of the agreement this is not extraordinarily uncommon. Such arrangement is often left to the parties to negotiate. In this case we are looking at a fairly large piece of estate land involving a sizeable consideration and the parties could have agreed to extend payment of the balance of the purchase beyond what is practiced in the purchase of a dwelling house.

2. As regards to the absence of a provision for specific performance in the event of the vendor refusing to complete the sale, I cannot comprehend how this can be used to infer a money lending transaction or that this transaction is not genuine sale and purchase of a landed property. By substituting this for specific performance the parties agreed to penalized the vendor when such a situation arise with a double payment i.e. pay back what the vendor had received plus an additional equivalent sum. If this had been a cover-up for a money lending deal I do not think that the borrower would agree to this provision since he would have to pay far too much to redeem his property especially when interest, as alleged, was already included in the initial deposit payment. This clause though providing an escape route to the vendor does not in itself reflects an arrangement where the borrower can have his property back by repaying the sum borrowed with interest. To me this penalty clause is more of a deterrent against a renegade vendor in a normal sale and purchase of property.

3. There is no evidence that the value of Kamatchy Estate was higher than what is stated in the S & P Agreement. Tan Sri Thamalingam is a respectable valuer and he prepared his report in 1982 long before these disputes between these parties to this suit began. His valuation of the market price of the property is comparable to the stated consideration in the S & P Agreement.

4. Seeralan's allegation is highly suspicious. Read in the light of other evidence, I do not consider it of any probative value. Madam Ponnamal had instantly denied this Seeralan's allegation in a sworn affidavit followed by her complaint to the Bar Council on Seeralan's conduct in this matter. Seeralan was disciplined by that professional body and had refused to attend court to press ahead with this allegation though being a party to the action. If Seeralan was committed to such allegation he would have defended it and not left unattended after asserting it, particularly when there was an avenue to verify its authenticity. Failure on Seeralan's part to do so gives Moorka Pillai's explanation on why Seeralan proceeded with such allegation much credit.

5. I do not have much regard for the evidence advanced by the plaintiff and PW3. Firstly PW3 is currently under the employment of the plaintiff. This could induce him to be on the side of the plaintiff. As for the plaintiff, I find his recollection of what the deceased told him

A is quite remarkable without having being spoken of this earlier or protesting to it at the family meeting. This is more significant when there is evidence of the deceased being a bachelor and went about his business in a quiet way. In evaluating the plaintiff's testimony one must not disregard that he holds a Power of Attorney for this brother-in-law Dr. Shan, who, if the plaintiff is successful in this B action would inherit the entire Kamatchy Estate. I view plaintiff's evidence with suspicion.

6. FIC was indeed obtained after the completion date. But failure to secure this before the completion date by itself and from the observations stated above cannot imply an existence that the C transaction was a sham. Solicitors usually made such application on behalf of their client. In this case, Mooka Pillai had disclosed that Seeralan was instructed to carry this task. Now that Seeralan is dead, we are deprived of his reason for this delay. But given the circumstances at that time, with the death of the deceased so close to the completion date; the demise of the sole beneficiary - Datin D Sellayee; and the competing interest in the deceased estate that followed, delay in this matters may be an acceptable excuse for reason of uncertainly. But there were other actions by Madam Ponnamal and Mooka Pillai to support the purchaser's earnest desire to proceed with the purchase. These are: application for a loan to finance the purchase; securing the services of a land valuer E to give an opinion on the value of the property for the purpose of the said loan; and the writing of letters to the dead man and carbon copies to all interested and affected parties indicating continual interest in purchasing the said property.

[25] Having considered the evidence as available in the appeal record in F this case ourselves, we agree with the Court of Appeal that the totality of the evidence in this case sufficiently supports the aforesaid findings of the learned trial judge. Indeed, in item 4 of the minutes of the family meeting it was clearly recorded by the plaintiff himself that the purchaser has paid to the deceased the deposit of RM420,000 and that the balance of RM2.58 million G was payable on or before December 18 as provided in paras. 1 and 2 of the agreement. There is therefore no basis for appellate intervention and we affirm the findings of the learned trial judge on the first issue.

[26] On the second issue, the learned trial judge ruled that the consent order was not a nullity. The learned trial judge opined that although the first H defendant was not technically wrong, equitably he should not have represented the deceased's estate in agreeing to the consent order. However, His Lordship held that even if the first defendant had no authority to consent, the official administrator (OA), by virtue of Justice LC Vohrah's order (made on 1 April 1985), had the authority to consent. This is what the learned trial I judge said:

> Technically he is not wrong but equitably this defendant should not have represented the deceased estate in agreeing to the Consent Order. At that time he was aware that there was a contest to the Will by the plaintiff.

Besides, he also knew that Letters of Administration had been granted to the plaintiff. In addition, the injunction, though permitting him to continue to act for the deceased estate this was only of a temporary and interim nature until the Official Administrator moves in. But he was not the only person who sanctioned this arrangement. In the Consent Order it is expressly declared that the Assistant Official Administrator, one Mr. Karunanithi, obviously representing the Official Administrator, was also present at the hearing on the 31.10.1985. Even if the 1st defendant had no authority to give consent but surely, by virtue of Justice L.C. Vohrah's Order, the Official Administrator had.

[27] The Court of Appeal affirmed the decision of the learned trial judge. It held:

Whether the consent order dated 31.10.1985 was a nullity

The learned trial judge's findings on this issue as summarised by us in the earlier part or our judgment was in the negative. In holding that the consent order was not a nullity, we agree with appellant's counsel that the learned judge did not address the question on whether or not the consent given by the 1st Defendant under a forged will was a nullity. However the failure of the judge to consider same does not to our mind affect the correctness of the judge's conclusion that the consent order was not a nullity. We say so because in the factual context herein there was overwhelming evidence that the 1st Defendant was not the only person who sanctioned the items of the consent order. The record shows that when the consent order was recorded before the Court on 31.10.85 there was present the Assistant Official Administrator whom the learned trial judge held had the requisite authority to give the relevant consent. He further found that the Official Administrator had been duly appraised of the factual matrix through the cause papers serves on him before he sanctioned the terms of the consent order.

[28] This brings us to the leave questions. In our view there is a link between the first and the third leave questions. This is necessarily so because although the High Court opined that the first defendant should not have represented the deceased in agreeing to the consent order, it nevertheless validated the consent order holding that even if the first defendant had no authority to give consent, the OA had the authority to do so by virtue of Justice LC Vohrah's order dated 1 April 1985. These two leave questions essentially bring into focus the role and legal capacity of the first defendant and the OA in relation to the deceased's estate when they appeared in OS 267/84 when the consent order was recorded. The main thrust of the plaintiff's appeal appears to be based on these questions. We will deal with these two questions first.

Submissions

The First Leave Question

(a) Can a valid consent be given for the sale of a deceased's property by an executor appointed under a will that is subsequently declared by the court to be a forgery?

[29] The thrust of the argument advanced on behalf of the plaintiff by his learned counsel is that a forged will is *void ab initio* and that the grant of probate and the title of the so-called executor was a nullity. The revocation of the will made the grant of probate *void ab initio*. Learned counsel relied on the Privy Council case of *Chan Kit San v. Ho Fung Hang* [1902] AC 257 where Lord Davey, speaking for the Privy Council said:

> By the revocation the grant of probate was made *void ab initio*, for there was not in fact any will to be proved. It is now known that the apparent title of the so-called executor, ... was founded on a fiction and a fraud, and for the purposes of the present argument the probate must be treated as a nullity and as never having had any real existence. The Court cannot be bound to take notice when the fact are known of an apparent right of action obtained by fraud.

[30] Learned counsel for the plaintiff also contended that any act done by an executor under a title created by a forged will was a nullity. In support of his submission he cited *Pundit Prayrag Raj v. Goukaran Pershad Tewari* 6 CWN 787 where the court held that it did not matter that the mortgage in that case was created by the executor before her probate was revoked. The court observed at p. 791:

> And lastly we must observe that in this case the Will having been declared to be a forgery, and therefore *void ab initio*, any acts done by the lady under any title created by the Will must be held to be in law void (see in this connection Williams on Executors, 9th Ed., p. 501.

[31] Learned counsel also referred to *Sheriffa Shaikhah v. Ban Hoe Seng & Co Ltd* [1963] 1 LNS 125; [1963] 29 MLJ 241 and *Canara Bank v. Canara Sales Corporation and Others* AIR 1987 SC 1603. In *Sheriffa Shaikhah* it was held that a forged power of attorney was a nullity and a mortgage deed created by the use of the forged power attorney was a nullity. In *Canara Bank* it was held that a forged cheque could give no mandate to the bank.

[32] Learned counsel submitted that the cases he had cited were in line with the principle that a forged instrument could create no legal rights in third parties and was *void ab initio*. Citing *Birch v. Birch* [1902] P 130 at pp. 137 - 138 (per Cozens-Hardy LJ), learned counsel submitted that a forged will was bad against the whole world and not just the forger.

[33] Reverting to the present appeal, learned counsel submitted that the first defendant consented to the consent order to transfer the estate to the second defendant in his capacity as an executor under the forged will, and upon the will being declared a forgery it became *void ab initio* and all actions taken by the first defendant pursuant to the will was a nullity. He contended that an executor appointed by a forged will could not bind the estate because his appointment itself was void in the eyes of the law.

[34] Learned counsel submitted that the first leave question should be answered in the negative and that the consent order be declared a nullity.

The Third Leave Question

(c) Whether the official administrator could validly consent to the sale of deceased property under s. 39 and s. 60 of the Probate and Administration Act 1959 without an empowering court order?

[35] According to learned counsel for the plaintiff, the third leave question became important because the courts below opined that although the first defendant should not have given consent to the sale of the said land, the consent was nevertheless validated because of the presence of the OA at the proceedings.

[36] Learned counsel submitted that as a matter of law under the Probate and Administration Act 1959 (the Probate Act), the OA was not empowered to approve the sale of the said land without first being appointed administrator of the deceased's estate. By virtue of s. 60(4) of the Probate Act, the OA then had to apply to court for permission to sell the said land. Learned counsel submitted that the mistake had come about as a result of failure to distinguish between a vesting order and an administrative order. A vesting order placed the OA in the same position as a receiver holding property in interim but an administration order would empower him to deal with the property. This, according to learned counsel was the distinction between s. 39 and s. 60 of the Probate Act. According to learned counsel, Justice Vohrah's order dated 1 April 1985 vested the estate in the OA. Under s. 39(1) of the Probate Act, the OA functioned only in an interim capacity like a receiver – he needed a further order to administrator the estate vested in him. *KALRM Karuppan Chettiar v. Subramanian Chettiar The Official Administrator, And Palaniappa Chettiar And Muthukarupaan Chettiar* [1930] 1 LNS 1; [1933] 2 MLJ 226, *Selvarajah & Anor v. Official Administrator & Anor* [1978] 1 LNS 246; [1978] 2 MLJ 108, *Lim Cheng Kwang v. Sivamalai Sinnathambi & Anor* [1994] 2 CLJ 59 and *Jamaliah Hj Mahsudi (Suing On Her Own Behalf And As Administratrix Of The Estate Of Salamah Hj Ali) & Ors v. Sivam Munsamy & Anor* [1998] 1 LNS 362; [1999] 5 MLJ 250 were cited in support of the submission.

[37] Learned counsel contended that under s. 60, only an administrator may apply to sell intestate estate property, and thus, in the absence of a court order appointing him as the administrator of the estate, the OA could not have validly consented to the sale. Therefore, his presence in the court proceedings could not in law be taken to be an assent because since he had not been appointed an administrator, he was not empowered to give any consent.

[38] Learned counsel for the first defendant submitted that the first leave question presupposed that only the first defendant granted consent on behalf of the deceased's estate which was not factually correct because when the first defendant gave consent as a representative of the deceased estate under O. 15 RHC 1980, the OA was also present in court and participated in the

A proceedings when the consent order was recorded. According to learned counsel, at the very least the OA had not opposed the order of specific performance of the agreement which was sought for.

[39] On the third leave question, learned counsel for the first defendant submitted that the present case is not a case of sale by the representative of
B a deceased's estate which could attract the application of s. 39 and s. 60 of the Probate Act. According to learned counsel, in this case the deceased executed the agreement during his lifetime. The representative of the deceased's estate consented merely to give effect to the transaction entered into by the deceased during his lifetime. The representative also had the
C benefit of the consensus of the beneficiaries of the deceased's estate in the form of the minutes of the meeting of the beneficiary, including the plaintiff. The first defendant's consent to a valid agreement which was a genuine bargain (as found by the trial court) should still stand. The first defendant was appointed by the court under O. 15 r. 6A of the Rules of the High Court 1980
D (RHC 1980). It was the exclusive right of an administrator to decide whether to sell or not to sell any land in the course of his duty as administrator of the estate of the deceased's person. *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761 (FC) was cited as the authority in support. Learned counsel submitted that the death of a
E seller/vendor did not vitiate a lawful agreement. *Hj Osman Abu Bakar v. Saiyed Noor Saiyed Mohamed* [1952] 1 LNS 33; [1952] 18 MLJ 37 and *Kersah La'uisn v. Sikin Menan* [1964] 1 LNS 57; [1966] 2 MLJ 20 were referred to in support of that submission.

[40] Learned counsel also submitted that setting aside of a perfected
F consent order can only be made on limited ground that it was null and void for illegality or lack of jurisdiction, and that the power to set aside should only be exercised judicially in exceptional cases where the defect was of such a serious nature that there was a real need to set aside the defective order to enable the court to do justice. *Badiaddin Mohd Mahidin & Anor v. Arab*
G *Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 at pp. 409, 426 was relied upon in support of that submission.

[41] The thrust of the submission of learned counsel for the second defendant in defence of the consent order is as follows: the second defendant was at all material times a *bone fide* purchaser of the land. The first leave
H question was misleading and it presumed that the first defendant consented to the consent order as an executor of the deceased's estate which was not the case because the first defendant was vested with the power to bind the estate by the order of the High Court appointing the first defendant as the personal representative of the estate. The first defendant was never the
I executor of the estate.

[42] Learned counsel of the second defendant submitted that although the injunction order by LC Vohrah J dated 15 October 1984 provided that the first defendant would act as the representative of the estate for the purpose

of OS 267/84 until the OA take over, (and the OA appeared to have taken over on or about 11 September 1985), the OA consented to the first defendant's continued involvement in the OS 267/84 and was in any event present at the hearing of OS 267/84 which culminated in the consent order. As such the deceased's estate was duly represented by the OA.

[43] Learned counsel further submitted that in any event, the plaintiff was estopped from taking issue with the consent order because he had not taken any positive step to intervene in OS 267/84, and had sat by and let events occurred as they did. In fact, according to learned counsel, the plaintiff could even be described as having instigated these events. In this regard he said, by a letter dated 12 April 1985, the plaintiff's solicitors requested the OA to take over the assets which the latter did. In his letter dated 11 September 2005, the OA said:

> Dengan hormatnya ingin saya memaklumkan bahawa Pegawai Pentadbir Pusaka Malaysia sedang menguruskan harta pusaka simati.

Learned counsel contended that the OA agreed with the course of action which culminated in the granting of the consent order.

[44] With regard to the third leave question, the substance of the submission of learned counsel for the second defendant is as follows. The OA was appointed to take over as representative for the estate by way of the varied injunction and the plaintiff was content to accept the state of affairs contemplated by the said order. Therefore, the plaintiff was precluded from contending that the OA was not in a position to make such orders as were necessary for the purpose of OS 267/84. This, according to learned counsel, included the recording of the consent order which was the culmination of a process which involved not only the OA but the plaintiff, through solicitors. In fact, it was submitted that the OA took over representation of the estate on the urging of the plaintiff's solicitors. In this context, learned counsel submitted that it was self-evident that the plaintiff was estopped from asserting a contravention of law in the manner which was attempted in this case. According to learned counsel, in the circumstances of the present case, estoppel applied. In support of his submission, learned counsel relied on *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716.

[45] Continuing his submission, learned counsel contended that in any event, ss. 39 and 60 of the Probate Act did not apply. At the time OS 267/84 was commenced, and subsequently the varied injunction was granted, a letter of administration had been issued in the name of the plaintiff. Although the letter of administration was caveated by the first defendant, this state of affairs necessarily precluded the application of s. 39 of the Probate Act, because it could not be said that administration had not been granted within the meaning of s. 39.

A **[46]** Learned counsel submitted that s. 60 of the Probate Act also did not apply because it applies to 'personal representative' within the meaning of s. 60(1) of the Probate Act which provides:

> In dealing with the property of the deceased his personal representative shall comply with this section.

B **[47]** However, according to learned counsel, the definition of 'personal representatives' under s. 2 of the Probate Act only included, other than where liability for death duties were concerned, an executor or administrator. It was submitted that the fact pattern in this case was clearly outside the scope of the definition. According to learned counsel, in this case, C the first defendant was appointed pursuant to O. 15 r. 6A of the RHC 1980. The OA was then directed by the High Court to take over as representative of the estate by way of the varied injunction. This was not an order made pursuant to, or to give effect, to s. 39 of the Probate Act, nor could it have been in the circumstances. The varied injunction did not have the effect of D appointing the OA in law as the executor or the administrator of the deceased's estate.

[48] Further, learned counsel submitted that the definition under s. 2 as aforesaid did not include the OA. Learned counsel submitted that in *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537, this court observed that by E virtue of s. 39 of the Probate Act, the OA became the legal representative of the estate in question until such time as probate or legal administration was granted. Learned counsel submitted that the OA as such was not an 'executor' or 'administrator' as contemplated by the definition as a distinction was drawn between the two roles and a 'legal representative'.

F **Decision Of This Court**

The First And The Third Leave Questions

[49] To reiterate, the plaintiff challenged the consent order on the basis that the will of the deceased (upon which the first defendant obtained a probate G on 21 August 1984) was declared by this court on 17 February 1997 to be a forgery and was therefore null and void. The court also ordered the probate to be revoked. It was submitted on behalf of the plaintiff that the first defendant had consented to the consent order to transfer the said land to the second defendant in his capacity as an executor under the forged will and H upon the will being declared a forgery it became *void ab initio* and all actions taken by the first defendant pursuant to the will was a nullity. It was contended that an executor appointed by a forged will could not bind the said land because his appointment itself was void in the eyes of the law. On behalf of the first defendant on the other hand, it was contended *inter alia*, that the I first defendant consented to the consent order as representative of the deceased under O. 15 of the RHC 1980. In a similar vein, it was contended on behalf of the second defendant that the first defendant had not consented to the consent order as an executor but was vested with the power to bind

the deceased's estate by the order of the High Court appointing the first defendant as the representative of the deceased's estate pursuant to O. 15 r. 6A of the RHC 1980. We agree. O. 15 r. 6A of the RHC 1980 provides:

6A Proceedings against estates (O. 15 r. 6A)

(1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A.B. deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.

(4) In any such action as is referred to in paragraph (1) or (3):

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or an application, make any such order as is mentioned in subparagraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

(5) Before making an order under paragraph (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making

such an order or on a subsequent application, the court, with the consent, of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.

(6) Where an order is made under paragraph (4), rules 7(4) and 8(3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff.

(7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings.

[50] Before the introduction of O. 15 r. 6A of the RHC 1980, a plaintiff could not commence an action against the estate of a deceased defendant until letters of administration were extracted. Order 15 r. 6A of the RHC 1980 enables a plaintiff to commence action against the estate of a deceased defendant, where no grant of probate or administration has been made in respect of the estate. The rule gives the plaintiff an advantage of commencing proceeding against a deceased defendant without first ascertaining the administrator or executor of the estate and obviates the risk of limitation setting in (see Malaysia Civil Procedure 2013 p. 159). In *Yong Siew Choon v. Kerajaan Malaysia* [2003] 2 CLJ 106; [2003] 2 MLJ 150, after stating the legal position before the introduction of O. 15 r. 6A of the RHC 1980, the Court of Appeal explained the scope of the rule. In this regard the following statement from the judgment of the Court of Appeal was approved by the Federal Court as excellent exegesis on O. 15 r. 6A of the RHC 1980 (see *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537; [2006] 1 MLJ 1):

> Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O. 15 r. 6A) to commence the action in the manner intituled. But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O. 15 r. 6A(4).
>
> It is our judgment that while O. 15 r. 6A is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it must comply with its terms before he or she may take advantage of any provision of substantive law. See, *Balachandran v. Chew Man Chan* [1995] 4 MLJ 685, per Vincent Ng J; *Singapore Gems Co v. The Personal Representives for Akber Ali* (deceased). Non-compliance therefore renders the action more than a mere irregularity. The entire action is badly constituted as a matter of substantive law. For, it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O. 15 r. 6A(7) of the RHC makes it abundantly clear that if the terms of O. 15 r. 6A of the RHC are complied with then an order or a judgment obtained in the action

> shall bind the estate of a deceased person. Conversely, therefore, if the provisions of O. 15 r. 6A of the RHC are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased. ...
>
> To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Order 15 r. 6A of the RHC provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in r. 6A(4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of r. 6A(4) of O. 15 will therefore deprive a plaintiff of the beneficial effect of r. 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity. As already stated in the preceding paragraph of this judgment that is what happened in the present case.
>
> The appeal is accordingly allowed. The order of the High Court is set aside. The plaintiff's action is dismissed with costs both in this Court and in the court below. The deposit is to be refunded to the appellant.

[51] In explaining the object of O. 15 r. 6A of the RHC 1980 in *Kerajaan Malaysia v. Yong Siew Choon (supra)* the Federal Court said at p. 548 (CLJ); p. 9 (MLJ):

> The starting point for such a consideration is the object of O 15 r 6A which is described in the Malaysian High Court Practice (1998 Desk Edition) Vol 1 at p 361 in the following terms:
>
> > The purpose of this rule is to overcome the difficulties of suing the estate of a person who had died before the commencement of the action and in whose estate no grant of probate or of administration had been made. There is no person to sue.
>
> [9] In the case of *Re Amirteymour, Deceased* [1979] 1 WLR 63, Lord Diplock in explaining the object of their O. 15 r. 6A of the Rules of the Supreme Court, upon which our O. 15 r. 6A is based, said at p. 66:
>
> > It has already been pointed out that proceedings against the estate of a deceased person that are authorised by s. 2 of the Proceedings Against Estates Act 1970 and O. 15 r. 6A take the form of actions *in personam*. They are neither actions in rem, which are peculiar to the Admiralty jurisdiction of the Court, nor are they actions against an abstraction? a form of proceeding unknown to English law. As in all actions *in personam* there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken. If and so long as there is no such person the action, though it may not abate, cannot

A be continued, as, for example, where a sole defendant to a subsisting action dies and no executor or administrator has yet been appointed against whom an order to continue the proceeding can be obtained under O. 15 r. 7.

[10] Thus, the object of O. 15 r. 6A is to provide a remedy where there B is no person in law who can be sued. It is therefore superfluous to state that even where no grant of probate or of administration has been made to the estate of a deceased person O. 15 r. 6A will have no application if there is, in law, a person who can be sued. An executor de son tort is such a person. As The Law of Wills, Probate Administration and Succession in Malaysia and Singapore by Mahinder Singh Sidhu says at C p. 146:

> When an executor has accepted office as an executor, he shall not thereafter renounce it. Acceptance does not mean only those executors appointed by the Court or authorised by the probate Court, to serve in that capacity. It includes an executor de son tort D who, without having been appointed executor, or without having taken out letters of administration, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor or administrator. He has all the liabilities and none of the privileges of an executor (*Coote v. Whittington* (1873) LR 16 Eq 534).

E **[52]** Returning to the appeal before us, on 25 February 1984 Mdm Ponnamal filed OS 267/84 in the Ipoh High Court against the deceased's estate (the first defendant) and one Mr Seerelan, her former solicitor (the second defendant), seeking for the following orders:

(a) within 2 months from date of this order the applicant be at liberty F to deposit the amount of $2,370,135.00 with this Honourable Court and upon deposit of the said sum of $2,370,135.00 the applicant be at liberty to proceed to register the transfer executed by the said Nadarajah s/o Sithambaram deceased in favour of Ponnamal d/o Ramasamy Pillai on 18.2.82;

(b) the second Defendant do immediately hand over the title deed G relating to Grant No. 12399 for Lot No. 1631 Mukim of Teluk Bharu, Mukim of Lower Perak held by him as stakeholder to the applicant's solicitors upon the applicant's undertakings that the said transfer shall not be presented for registration until the balance of the purchase price is deposited in accordance with prayer (a);

H (c) the parties be at liberty to apply and the costs of this application be provided for.

[53] The facts which form the basis of Mdm Ponnamal's application as disclosed in her affidavit are as follows. On 18 February 1982, she entered into the agreement with the deceased to purchase the said land for a total I consideration of RM3,000,000 and that upon execution of the agreement she paid RM420,000 as a deposit and part-payment of the purchase price; the balance of which was to be paid on or before 18 December 1982 but subject

to the approval of the Foreign Investment Committee (FIC) being obtained. Before completion of the purchase, on 20 August 1982 the deceased passed away. Mdm Ponnamal affirmed that as far as she knew, no person had taken out letters of administration in respect of the deceased's estate and that she understood that there was a dispute among members of the deceased's family, and that it would take some time before the dispute was resolved and letters of administration were granted. She affirmed that she had always been ready and willing to complete the purchase, but as there was no legal representative of the deceased's estate, she had not been able to pay the balance of the purchase price. She further affirmed that the FIC granted the approval for the purchase of the said land on 14 April 1983. According to her, pursuant to the agreement, the deceased had already executed a transfer in favour of her nominee, and the memorandum of transfer together with the document of title were deposited with the second defendant who was holding the same as stakeholders. After the execution of the agreement it had come to her knowledge that sometime in 1980, the Perak State Government had acquired an area of 21 a. 1 r. 25 p which formed part of the said land purchased by her. The deceased did not disclose this when the agreement was executed by the parties. She had been advised by her solicitors and she verily believed that in view of the said non-disclosure by the deceased, she was entitled to deduct from the balance of the purchase price, the value of the said land acquired by the Government calculated according to the purchase price as stated in the agreement. The amount to be deducted was RM209,865. She had also made arrangement with the bank to obtain the necessary finance to complete the purchase and she was prepared to deposit the balance of the purchase price in court. She was advised by her solicitors and she verily believed that she should deposit the balance of the purchase price in the court and obtain the court order to proceed to register the transfer.

[54] In our view, Mdm Ponnamal was entitled to file OS 267/84. Having filed the OS, she could not have proceeded further to prosecute the action to judgment without taking action to comply with the provision under O. 15 r. 6A(4) of the RHC 1980. Non-compliance with O. 15 r. 6A(4) would render the action filed a nullity. The entire action would have been badly constituted as a matter of substantive law. For it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained which may be enforced against the estate. That is why O. 15 r. 6A of the RHC 1980 makes it abundantly clear that if the terms of that order are complied with, then an order or a judgment obtained in the action shall bind the estate of a deceased person. (See the Court of Appeal judgment in *Yong Siew Choon v. Kerajaan Malaysia (supra)* at p. 156). Unlike the respondent plaintiff in *Yong Siew Choon v. Kerajaan Malaysia (supra)*, where after having commenced the action against the estate of the deceased, it did nothing else save to prosecute the action to judgment, we find that in the present appeal, Mdm Ponnamal did comply with O. 15 r. 6A(4)

of the RHC 1980. Having commenced her action in OS 267/84, she followed it up by filing the summons-in-chambers (p. 1632-1633, jilid 16 of the appeal record) applying for a court order appointing a person (the first defendant) to represent the deceased's estate for the purpose of OS 267/84 as follows:

> (a) that Periasamy s/o Sithambaram Pillay of 5 Market Street, Teluk Intan, Perak, be appointed to represent the estate of Nadarajah s/o Sithambaram Pillay deceased for the purpose of the proceedings herein and that the order given or made in the proceedings herein do bind the estate of Nadarajah s/o Sithambaram Pillay deceased.
>
> (b) that the costs of the application be costs in the cause.

[55] Order 15 r. 6A(4)(a) of the RHC 1980 provides for the following two alternative situations:

> (i) the plaintiff shall apply to the court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings; or
>
> (ii) if a grant of probate or administration has been made, the plaintiff shall apply for an order that the personal representative of the deceased be made a party to the proceeding.

[56] It is clear from the prayer in her application and her affidavit filed in support of that application that she was not seeking for an order that the personal representative of the deceased (pursuant to a grant of probate or administration) be made a party to the proceedings in OS 267/84. So, her application was not dependant on any probate. It is true that in her affidavit, she mentioned about being informed by the first defendant about a will purportedly executed by the deceased on 7 April 1982 appointing the former as the executor of the deceased's estate. However, no probate had been obtained. In this regard she affirmed that steps were being taken by the first defendant to apply for probate. However, she said that as there were some problems among the members of the deceased's family, it would take some time before probate was obtained. It is opportune to add at this juncture that although an executor derives his title and authority from the will of his testator and not from any grant of probate, the production of the probate is the only way in which he is allowed to prove his title (see *Meyappa Chetty v. Supramaniam Chetty* [1916] I AC 603 PC, p. 608, per Lord Parker of Waddington). So, without a probate the first defendant's title pursuant to the will was not proven. Thus, the will was not and could not have been the basis of Mdm Ponnamal's application. Her application was not under the second limb of O. 15 r. 6A(4)(a) of the RHC 1980. It is clear from the prayer in her application and the affidavit in support that she had applied to the court for an order appointing a person (the first defendant who was the deceased's brother) to represent the deceased's estate for the purpose of the proceedings in OS 267/84. In our view, under O. 15 r. 6A(4)(a) of the RHC 1980 for such a person to be appointed there is no requirement that a probate or letters of administration have been granted. As we have explained, if probate or

administration had been granted, the application should be under the second limb of O. 15 r. 6A(4) of the RHC 1980 for the personal representative of the deceased to be made a party to the proceedings. Indeed, in this case as evident from her affidavit in support of the application, Mdm Ponnamal made the application because no person had taken out letters of administration in respect of the deceased's estate. That was the basis of her application. She affirmed that she understood steps were being taken by the first defendant to apply for probate. However, as there were some problems among the members of the deceased's family it would take some time before probate was eventually obtained. It was in those circumstances that on 20 April 1984, Annuar J (as he then was) allowed Mdm Ponnamal's application, and ordered the following:

> that Periasamy s/o Sithambaram Pillay of 5 Market Street, Teluk Intan, Perak, be appointed to represent the Estate of Nadarajah s/o Sithambaram Pillay deceased for the purpose of the proceedings herein (O. S 267/84) and that the order given or made in the proceedings herein (O. S 267/84) do bind the Estate of Nadarajah s/o Sithambaram Pillay deceased.

[57] In our view, that order was properly made pursuant to O. 15 r. 6A(4)(a) of the RHC 1980 and it duly appointed the first defendant as the legal representative of the deceased's estate for the purpose of the proceedings in OS 267/84, and more importantly, pursuant to O. 15 r. 6A(7), the court ordered that the order given or made in OS 267/84 do bind the deceased's estate. In other words, since the first defendant had been duly appointed the legal representative of the deceased's estate, any judgment may be obtained and enforced against the deceased's estate. To recall what was held by the Court of Appeal in *Yong Siew Choon v. Kerajaan Malaysia (supra)*:

> ... It is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O. 15 r. 6A(7) of the RHC makes it abundantly clear that if the terms of O. 15 r. 6A of the RHC are complied with then an order or a judgment obtained in the action shall bind the estate of a deceased person. Conversely, therefore, if the provisions of O. 15 r. 6A of the RHC are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased.

[58] In our view, in the appeal before us, the provisions under O. 15 r. 6A of the RHC 1980 had been complied with. The consent order against the deceased's estate which was properly represented by the first defendant as the duly appointed legal representative of the deceased's estate was properly obtained and was enforceable against the deceased's estate.

[59] Indeed, even Vohrah J's *ex parte* injunction order granted on 1 April 1985 also appeared to have recognised and given effect to the court order appointing the first defendant as the representative of the deceased's estate

A when it ordered the first defendant "to continue acting as representative of the estate of Nadarajah s/o Dato' Sithambaram Pillai in the High Court Originating Summons No. 267/84 until the Official Administrator Malaysia take over; (b) that the Official Administrator Malaysia to take charge of all the assets of the estate of Nadarajah s/o Dato' Sithambaram Pillai".

B **[60]** We have not lost sight of the fact that the first defendant was ordered "to continue acting as representative of the deceased's estate until the OA takes over and that the OA was to take charge of all the assets of the deceased's estate". The order must be read as a whole. The question is when did 'takes over' become effective to end the first defendant's role as legal C representative of the estate? In our view, logically, 'takes over' in the order must be 'takes over' validly as administrator of the estate. In other words, until the OA 'takes over' validly as administrator of the estate, the first defendant was to continue acting as representative of the deceased's estate in the proceedings in OS 267/84. Thus, we are of the view that if that order D was construed to be an order vesting all the assets of the deceased's estate in the OA, in line with s. 39 of the Probate Act, mere vesting of the assets as such did not authorise the OA to deal with the assets of the deceased's estate. The OA must proceed to apply for and extract the grant of letters of administration, to administer the estate (see *Chay Chong Hwa & Ors v. Seah Mary* [1986] 1 LNS 68; [1987] 1 MLJ 173, PC, *KALRM Karuppan Chettiar* E *v. Subramanian Chettiar The Official Administrator, And Palaniappa Chettiar And Muthukarupaan Chettiar* [1930] 1 LNS 1; [1933] 2 MLJ 226, *Selvarajah & Anor v. Official Administrator & Anor* [1978] 1 LNS 246; [1978] 2 MLJ 108. Without the letters of administration, it was not competent for the OA to represent the deceased's estate in place of the first defendant. In this case, F there is nothing to show that by 31 October 1985, the OA had applied for letters of administration. Further, even if the order date 1 April 1985 could be construed to be an order appointing the OA as the administrator of the deceased's estate, it was not sufficient to clothe the OA with the title and authority to act as the personal representative of the estate. In this regard, in G *Jigarlal Kantilal Doshi v. Amanah Raya Bhd* [2011] 9 CLJ 361, this court said at p. 373:

> [17] With respect, we are in agreement with the submission of the appellant that the Court of Appeal had failed to appreciate the distinction between an appointment and a grant. It is the grant that clothes the H personal representative with a title upon its issue by the Registry under the seal of court. The administrator derives his title from the grant and cannot act until then. We agree with what Ismail Khan J said in *P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors* [1961] 1 LNS 78 that "it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with the representative character I and to have acquired a title to the estate". The learned judge in that case also followed Lord Parker's observation in the case of *SMKR Meyappa Chetty v. SN Supramaniam Chetty* [1957] 1 WLR 157, that:

> An administrator on the other hand derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled.

[61] In this case, there is nothing to show that by 31 October 1985 the OA had been issued by the court registry under the seal of court, with letters of administration. Thus, he was not competent to act as personal representative of the deceased's estate in the proceedings in OS 267/84. That being the case it cannot be said that on 31 October 1985 the OA had taken over in place of the first defendant. In short, in either case, on 31 October 1985, the OA had not taken over from the first defendant. Thus, on 31 October 1985 the first defendant was still the duly constituted legal representative of the deceased's estate when he assented to the consent order which, in our view, was properly made and enforceable.

[62] In view of what we have said thus far, we find it unnecessary to answer the first and the third leave questions.

The Second Leave Question

(b) Whether the approval given by the court to a consent order for the sale of estate property is valid when pending interpleader summons challenging the genuineness of the sale was not brought to the attention of the court?

[63] The thrust of the submission by learned counsel for the plaintiff in respect of the second leave question is as follows. The draft consent order which was settled between the solicitors for the first and the second defendants respectively, two days before the recording of the consent order. It was tendered before Ajaib Singh J for approval on 31 October 1985. It was recorded by the learned judge as if it was an uncontested matter without any controversy surrounding it. The attention of the learned judge was not brought to the interpleader summons taken out in the same proceedings (OS 267/84) by the solicitor, Mr Seeralan, or the affidavits filed by him in support of that interpleader summons which challenged the agreement transacted between the deceased and Mdm Ponnamal as not being a genuine sale. The consent order records Mr Seeralan as being absent as if he had stayed away from the proceedings although served, whereas Mr Seeralan had notified the court and the solicitors for the first and the second defendants of his absence, and that he would "abide by any decision of the court or to act under the directions of the court". Mdm Ponnamal's solicitor was requested to mention on Mr Seeralan's behalf. Mr Seeralan (since deceased) was the former solicitor for Mdm Ponnamal, who drafted the agreement. Upon being served with the originating summons in OS 267/84, Mr Seeralan through his solicitors took out an interpleader summons declaring that he had no personal interest in the property but asking the court to determine who was entitled to the title in his custody. In his supporting affidavit, he alleged that the sale was in fact a disguise for a money lending

A transaction. Learned counsel for the plaintiff contended that it was obligatory for the first and second defendants to bring to the interpleader summons to the attention of the learned judge for him to decide on the interpleader. As that was not done, the consent order was made without the interpleader being decided on whether the sale was a genuine sale. Learned counsel for the
B plaintiff submitted that there was no explanation from both defendants as to why that interpleader summons was not disclosed to the court on 31 October 1985. It was contended that in the result, the Ipoh High Court approved the draft consent order without being informed of the interpleader summons and the affidavits impugning the sale. The interpleader summons
C was never adjudicated or dismissed. The High Court therefore did not adjudicate on the question whether the agreement was a genuine sale or a disguised money lending transaction. It was contended that it was obligatory for the first and second defendants to bring to the attention of the learned judge the interpleader summons for him to decide on it. As this was not done,
D the consent order was made without the interpleader being decided on whether the impugned sale was a genuine sale or a disguised money lending transaction. It was contended that the consent order was approved by the court without full disclosure of the relevant facts by the parties who obtained the order. It was also contended that the first and the second defendants had acted collusively with each other to obtain the order by keeping out the
E plaintiff, and without full disclosure. The consent order was therefore vitiated under s. 44 of the Evidence Act 1950. It was submitted that where the court was led into making an order without disclosure of all the facts, such an order could not stand. In support of that submission, learned counsel relied on *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321;
F [2001] 4 MLJ 346; *Shripadgouda v. Govindgouda*, AIR 1941 Bomb 77; and *Meek v. Fleming* [1961] 3 All ER 148.

[64] For the first defendant, it was submitted that the second question was predicated on matters which had not been pleaded. Since the question was never in issue in the courts below, it should not be an issue before us. For
G the second defendant, it was submitted that the second question was misleading as the interpleader summons was not made an issue by Mr Seeralan. According to learned counsel for the second defendant, Mr Seeralan in fact left the matter to the court after having informed the Registrar that he would abide by any order of the court. Had it been an
H important matter, Mr Seeralan would have taken issue with OS 267/84, which he failed to do. Learned counsel contended that therefore it was not open to the plaintiff to seek to do so in the High Court action (the Ipoh High Court Civil Suit No. 2087/85) the decision in which is the subject matter of the instant appeal. Learned counsel also submitted that adjunct to this, was
I the undisputed fact that the plaintiff failed to take any active steps to intervene in OS 267/84. This, it was submitted, was an election to abandon any challenge to jurisdiction, and thus an implied acceptance of jurisdiction. It was argued that the plaintiff could not subsequently take an inconsistent

position. In support of his submission, learned counsel referred to *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665 and *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305.

[65] The second leave question makes specific reference to the pending interpleader summons. So, the starting point is to ask whether the pending interpleader summons (Seeralan's summons-in-chambers) (see p. 1642-1643, appeal record, vol. 16) is in fact an interpleader summons?. Interpleader summons as provided under O. 17 r. 1(1)(a) of the RHC 1980, is the provision for what is styled as stakeholder's interpleader, which is the applicable provision in the context of the present case. The whole object of the interpleader provision is to enable a person in the position of a stakeholder to get relief from the court and get it decided as to which of the two or more claimants he has to account for the money, goods or chattels which he holds. So, as provided by O. 17 r. 1(1)(a) of the RHC 1980, the state of being sued or the expectation to be sued in respect of those goods "by two or more persons making adverse claims", is the precondition which the applicant must fulfil to give the court the jurisdiction to exercise discretion to grant the relief, provided under O. 17. There must be some real foundation for such expectation. In this regard, even a letter from one of the adverse parties containing a direction and warning to the interpleader not to release the contested documents of titles, for example, could not be construed as a claim from that party. This is clear from the judgment of this court in *Tetuan Teh Kim Teh, Salina & Co v. Tan Kau Tiah & Anor* [2013] 5 CLJ 161, where the court said:

> [34] O. 17 r. 1(a) RHC is the provision for what is known as stakeholder's interpleader. Under this provision a person who holds any money, goods or chattels which he does not claim, or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the Court can decide to whom the money, goods or chattels belong. (*Mallal's Supreme Court Practice*, 2nd edn, vol. 1, 1983). The nature of an interpleader is lucidly explained in *De La Rue v. Hernu, Peron & Stockwell Ltd. De La Rue claimant* [1936] 2 AER 411 [referred to by this Court in *Chin Leong Soon & Anor* [1970] 2 MLJ 228. See also *Glencore International AG v. Shell International Trading and Shipping Co Ltd and another* [1999] 2 All ER (Comm) 922] ...
>
> [40] The discretionary relief of interpleader (provided under O 17 r 1(a) RHC) will not be granted unless there appears to be some real foundation for expectation of a rival claim [see *Watson v. Park Royal (Caterers) Ltd* [1962] 2 All ER 346, *Chin Leong Soon & Ors v. Len Chee Omnibus Co. Ltd (supra)*]. It appears from its judgment that the Court of Appeal was not satisfied on the evidence, that the precondition that there must appear to be some real foundation for such expectation was made out. In other words, the precondition that the Plaintiff "expects to be sued" in respect

of the documents of titles "by two or more persons making adverse claims thereto" required under O. 17 r. 1(a) had not been fulfilled., In its judgment the Court of Appeal said:

> "And a mere direction and warning" from the second respondent not to release the 18 original issue documents of titles cannot be construed as a claim against the first respondent. We will now reproduce the letter dated 10.5.2007 from the solicitors for the second respondent addressed directly to the first respondent and that letter will show that there was no "direction or warning" from the solicitors of the second respondent but rather it was couched in general terms as a mere statement and nothing else. That letter was worded as follows (see page 327 to 328 of Bahagian "C" Jilid 3):
>
> With regard to the demand for the return of the said titles, please take note of the following:
>
> (i) Our client Bintang Merdu has applied to the High Court to remove the Arbitrator in this matter on grounds of misconduct;
>
> (ii) Our client has also applied to amend the above application to set aside the interim 'Award' also for misconduct;
>
> (iii) Our client has also applied by Summons for (an) injunction to restrain the Arbitrator and the Claimant Tan Kau Tiah from taking further steps in this matter, and this application is part heard before the Honourable Judge of the High Court; and
>
> (iv) The 'interim Award' has not been registered, and it is our client's intention to vigorously oppose any application to do so.
>
> It is our client's view that the titles should be held by you as (a) stakeholder until the dispute is resolved, which is not the case at present.
>
> We trust (that) you will take into consideration the above matter in carrying (out) you duties as (a) stakeholder in this matter and in deciding the status of the said titles.

[41] We accept the finding that the letter dated 10.5.2007 was not a "direction and warning" from the first Defendant to the Plaintiff, and that it did not amount to a claim by the first Defendant to the title. The letter merely stated the first Defendant's view that the Plaintiff should continue to hold title until the dispute between the first and second Defendant was resolved.

[66] On the mode of the application under O. 17 this court said:

[42] O. 17 r. 3(3)(b) of RHC also requires that an interpleader summons must be supported by evidence that the applicant:

(a) claims no interest in the subject matter in dispute other than for charges or costs;

(b) does not collude with any of the claimant to that subject-matter;

and

(c) is willing to pay or transfer that subject-matter into Court or to dispose of it as the Court may direct.

[67] In his affidavit in support of his purported interpleader application, Mr Seeralan stated that on 18 February 1982 Mdm Ponnamal's husband agreed to lend $300,000 to the deceased to be repaid on or before 18 December 1982. Out of the said sum, $120,000 represented interest. Mr Seeralan stated that he was instructed to draw up the relevant documents in the name of Mdm Ponnamal, and to include $120,000 claimed by way of interest in the principal sum thereby making a total of $420,000. To secure the loan, Mr Seeralan drew up a document purported to show that the deceased had agreed to sell to the plaintiff the said land for a sum of $3,000,000. According to Mr Seeralan, the real value of the said land in 1982 exceeded $5,000,000. The deceased died on 20 August 1982 before the money lent was due for payment. Mr Seeralan then deposed the following:

8. The Plaintiff now claims that she is entitled to complete the purchase of the said land under the said agreement and has instituted the proceedings herein.

9. The claim against the First Defendant in the present form *inter alia* untenable as no Letters of Administration has to the best of my knowledge information and belief been extracted and as there are serious questions in dispute and Originating Summons is not an appropriate means of disposing the conflicting interests.

10. The issue document relating to the said land was left with me as stakeholder and as security for the loan together with a signed document of transfer as stated in the Statement of Claim.

11. I have in the past done similar transaction for the Plaintiff's husband.

12. I claim no interest in the said issued document of this title or the signed document of transfer or in any of the documents and chattels set one in the Statement of Claim and do not in any manner collude with the estate of the deceased who are described as the First Defendant.

[68] Paragraph 9 of Mr Seeralan's affidavit is crucial. It is evident that Mr Seeralan was not seeking for interpleader relief as a person who was vexed by suits from two or more person making adverse claims. Paragraph 9 embodies his real complaints. His first complaint was that Mdm Ponnamal's claim against the first defendant was untenable because he alleged that no letters of administration has been extracted. This is not and cannot be a ground for an interpleader application. In any case, this is not

A true because as alluded to earlier in this judgment, on 20 April 1984, the High Court had made an order appointing the first defendant to represent the estate under O. 15 r. 6A(4)(a) of the RHC 1980. Mr Seeralan's other complaint was that according to him as there are serious questions in dispute, originating summons procedure was not an appropriate means of disposing
B the dispute. This is reinforced by his subsequent affidavit when he stated as follows:

> 5. What is in dispute is not the ownership or the right to purchase any land but whether the Court should not in view of the fact set out in the affidavit supporting my interpleader application go beyond the documents
C prepared and which said documents have been left in my custody as stakeholder and ascertain if the transaction was a mere money lending transaction or in fact a transaction involving the sale and purchase of a rubber estate.

He was not actually seeking for interpleader relief. That was not the purpose
D of his application. He himself agreed that the ownership of the land and the right to purchase was not in dispute. What he wanted the court to do was beyond that. He wanted the court to investigate and adjudicate whether the sale was mere money lending transaction. Again this is not and could not be a ground for an interpleader application. In any case, if he was serious about his allegation, since he was already made a party to OS 267/84, he should
E pursue his allegation in that proceeding itself, rather than leaving it to be questioned later by the plaintiff (who was not a party to OS 267/84). A party litigant cannot be indifferent and negligent in his duty to place the materials in support of his contention and afterwards seek to show that the case of his opponent was false. (See *SP Chengalvaraya Naidu v. Jaganath* AIR 1994, SC
F 853, per Kuldip Singh J). As it transpired, Seeralan was not present in the proceeding on 31 October 1985 and was content to have Mdm Ponnamal's solicitor mention on his behalf. In our view, Mr Seeralan failed to fulfil the precondition under O. 17 r. 1(1)(a) of the RHC 1980 that he was being sued or expected to be sued by two or more persons making adverse claims. Thus,
G the so called interpleader application was not proper before the court pursuant to O. 17 of the RHC 1980 to clothe it with the jurisdiction to consider the interpleader application first before considering OS 267/84.

[69] Be that as it may the more important question which must be considered is whether the point raised in the second leave question was
H pleaded by the plaintiff? Although the challenge as to the genuineness of the sale (ie, whether it was a disguised money lending transaction) was mentioned in the leave question, that is not the focus of the leave question. From the leave question what was not brought to the attention of the court (in other words not disclosed to the court) was the pending interpleader
I summons. Thus, it is clear that the focus of the second leave question is the interpleader summons which it was alleged was not brought to the attention of the court. The question then raised is whether in such a case the consent order is valid? In the nutshell the contention of the plaintiff in respect of the

second leave question is that Seeralan's interpleader summons must be disclosed by the first or the second defendants to the court. In other words, since it was an interpleader summons, it must first be decided by the court before it could consider OS 267/84. Failure to do so vitiated the consent order under s. 44 of the Evidence Act 1950. That section provides that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss. 40, 41, or 42 of the Evidence Act 1950, and which has been proved by the adverse party, (a) was delivered by a court not competent to deliver it, or (b) was obtained by fraud or collusion.

[70] In our view, the point raised by the plaintiff in the second leave question constitutes a specific ground of challenge on the validity of the consent order. This ground of challenge is separate and different from the grounds already pleaded by the plaintiff in his pleading in impugning the consent order and praying for it to be set aside. In forming such a view we have not lost sight of para. 16 of the amended statement of claim which contains the following averment:

> By reason of the matters aforesaid the Plaintiff avers and contends that the Consent Order of 31st October 1985 is a nullity and was obtained by non-disclosure, deception and fraud by the First Defendant and Ponnal and ought to be set aside.

[71] The matters aforesaid in the above paragraph are matters pleaded in para. 1 to para. 15 of the amended statement of claim (jilid 2, record rayuan, p. 138 to p. 143). For completeness we set out those paragraphs below:

> 1. The Plaintiff is the Administrator of the Estate of Nadarajah s/o Dato Sithambaram Pillai (hereinafter referred to as "the Deceased") by Order of Court made on 16th August, 1983 in Kuala Lumpur High Court Petition No. 369 of 1983. Letters of Administration with Will annexed were extracted on 4th November, 1997.
>
> 2. The 1st Defendant had purported to be the executor, under an alleged Will of the Deceased dated 7th February, 1982 ("the alleged Will"), of the estate of the Deceased and in this regard had obtained an Order of probate from the Ipoh High Court *vide* Petition No. 152 of 1984, without disclosing to the Ipoh Court of the prior Grant of Letters of Administration (LA) to the Plaintiff. The 1st Defendant's grant and the alleged Will are being impeached in proceedings brought by the Plaintiff *vide* Kuala Lumpur High Court Originating Motion No. F54 of 1984.
>
> 3. The 2nd Defendants are the Personal Representatives of the Estate of Ponnamal d/o Ramasamy Pillai (Deceased) ("Ponnamal"). Ponnamal is the alleged purchaser of the land held under Grant No. 12359 for Lot No. 1631, Mukim of Teluk Bharu, District of Lower Perak, (hereinafter referred to as "the said land") under an alleged

A Sale and Purchase Agreement dated 18th February 1982 with the Deceased. The said land was at all material times registered in the name of the Deceased who was the legal and beneficial owner thereof.

4. The Plaintiff avers that upon the death of the Deceased on 20th August 1982 the said land vested in the estate of the Deceased in intestacy. It was accordingly the responsibility of the lawful administrator of the estate to decide on all claims made on the said land.

5. The Plaintiff and the 1st Defendant were in dispute as to who was the lawful Administrator of the estate of the Deceased. In this respect the Plaintiff instituted proceedings *vide* Kuala Lumpur High Court Originating Motion No. F54 of 1984 to revoke the Grant to the 1st Defendant as a nullity, and further that the alleged Will under which the 1st Defendant purports to act is a forgery and that the 1st Defendant was responsible for or/had complicity in the forgery.

6. By an interim Order *vide* Kuala Lumpur High Court O.M. No. F-54-1984 made on 1st April, 1985 the Kuala Lumpur High Court, *inter alia*, ordered that the 1st Defendant continue acting as the representative of the estate of the Deceased in Ipoh High Court Originating Summons No. 267 of 1984 only until the Official Administrator Malaysia takes over.

7. In breach of the said Order and notwithstanding that the Official Administrator had taken over the assets of the Deceased the 1st Defendant purported to represent the estate and consent to the Order of 31st October 1985.

8. The Plaintiff avers that the said consent of the 1st Defendant is a nullity and the said Consent Order is in consequence a nullity.

9. The Plaintiff avers that the purported Sale Agreement of 18th February, 1982 was in reality a sham for a money lending transaction between the Deceased and one Mookapillai s/o Arumugam Pillai, the husband of the Ponnamal, wherein the said Mookapillai lent the Deceased a sum of $300,000 to be repaid with interest at $120,000 on or before 18th December 1982.

10. The real value of the said land in 1982 was $5,000,000 but it was deliberately undervalued as $3,000,000 in the alleged Sale Agreement.

11. Moreover, the alleged Sale Agreement made no mention of the acquisition of part of the land by the authorities. Ponnamal has purported unilaterally and without any authorisation to deduct from the purported sale price a sum equivalent to the value of the acquired land.

12. Further, notwithstanding that the alleged Sale contract had elapsed through non-completion by the completion date, and the death of the Deceased before completion, the Ponnamal purported to apply for Foreign Investment Committee F.I.C. approval and complete the alleged sale.

13. Notwithstanding the above matters and in spite of knowledge of the same the 1st Defendant has purpoted to consent to the alleged sale and/or the Order of 31st October 1985 made under the proceedings known as Ipoh High Court Originating Summons No. 267 of 1984, thereby depriving the estate of the said land and perpetrating a fraud on the beneficiaries and the estate. The Plaintiff avers that the said consent of the 1st Defendant is a nullity and the said Consent Order is in consequence a nullity.

14. The Plaintiff further avers that there was collusion between the 1st Defendant and Ponnamal to deprive the estate of the Deceased of the said land. The Plaintiff contends that this is fraud on the estate and the beneficiaries thereof.

15. The Plaintiff further avers that the procedure in the proceedings Ipoh High Court Originating Summons No. 267 of 1984 and the Orders sought thereunder amounted to a decree of specific performance of the alleged Sale Agreement and was clearly wrong. Notwithstanding the patently wrong procedure the 1st Defendant purported to consent to the said application of Ponnamal. The said consent and the order thereon was a nullity.

15A. On 17 February, 1997 the Supreme Court gave judgment and pronounced against the alleged Will declaring the same to be a forgery. In the circumstances, all steps and actions taken by the 1st Defendant under the alleged Will are a nullity including and in particularly his attendance in Court on 31 October 1985 through his Counsel to give consent to the purported sale in his capacity as Executor under the alleged Will.

15B. Further the Supreme Court by its Order of 17 February 1997 expressly revoked the Grant of Probate in favour of the 1st Defendant granted by the Ipoh High Court *vide* Probate Petition No. 152 of 1984 on 21 August 1984. Accordingly, all actions and sanctions or consents given or steps taken by the 1st Defendant in his capacity as Executor under the said Grant of Probate is void and of no effect.

15C. Further by reason of the judgment of the Supreme Court aforestated and the Orders made therein, the 1st Defendant could not have validly represented the Estate of Nadarajah in any proceedings.

15D. In particular the Plaintiff says that the purported Order of 20 April 1984 appointing the 1st Defendant who had held himself out as the Executor appointed under the alleged Will, to represent the Estate

A of Nadarajah was a nullity by reason of the said Will being declared a forgery. Further the Plaintiff will contend that the conduct of the 1st Defendant in the said Will forgery proceedings in failing to give evidence on oath to deny the allegations against him and actively setting up a Will that was pronounced a forgery, shows his complicity in defrauding the Estate of Nadarajah and further that
B his involvement in the instant proceedings in purporting to represent the Estate and give consent and to receive payment from Ponnamal is part of a single scheme to defraud the Estate.

[72] Those paragraphs of the amended statement of claim amongst others, contain averments about the plaintiff and the defendant being in dispute as
C to whom was the lawful administrator of the estate of the deceased, the plaintiff being the administrator of the estate *vide* the court order dated 16 August 1983, the first defendant purporting to be the executor of the deceased's estate and obtaining an order of probate in the High Court Petition No. 152 of 84 relying on an alleged will of the deceased dated 7 February
D 1982 without disclosing to the High Court of the prior grant of letter of administrator (LA) to the plaintiff, and the plaintiff's action to impeach the alleged will in Originating Motion No. F 54 of 1984 culminating in the Federal Court Order on 17 February 1997 declaring the alleged will to be a forgery. Consequently, it was averred by the plaintiff that the first
E defendant could not claim any right or justification for his action under the forged will, and accordingly, all actions and sanctions or consent given or steps taken by the first defendant in his capacity as executor under the said grant of probate was void. Clearly, that essentially is the pleaded case of the plaintiff in seeking to set aside the consent order as being a nullity/or null
F and void. Of course lest it be forgotten, the other material matter pleaded was that the agreement in reality was a sham money lending transaction. But as we have said earlier, the focus of the second leave question is not the averment that the sale was a sham money lending transaction itself, but the non-disclosure of the interpleader summons filed by Mr Seeralan. Indeed, the issue of whether the sale was a sham money lending transaction was
G adjudicated in the trial before the High Court which concluded (and in our view rightly) that the plaintiff had failed to prove on the balance of probability that the agreement was a sham transaction for the cover up of an illegal money lending transaction. In fact in arriving at that conclusion the learned High Court Judge had among other evidence, duly considered
H Mr Seeralan's allegation in his affidavit that the sale was a cover up for a money lending transaction. (See paras. 24 to 25 of this judgment). It appears to us that the non-disclosure of the interpleader summons as a ground of challenge to the validity of the consent order was an indirect way of reviving or relitigating the issue of whether the sale was a sham money lending
I transaction which had been decided by the High Court (and the decision of which was affirmed by the Court of Appeal). More importantly, we find that

the non disclosure of the interpleader summons filed by Mr Seeralan under O. 17 r. 1(1)(a) of the RHC 1980 was never pleaded by the plaintiff as a separate and/or alternative ground in seeking to nullify and set aside the consent order. Since this issue and the material facts to support it were not pleaded by the plaintiff in his amended statement of claim, the plaintiff could not be allowed to succeed and obtain judgment on it on appeal. In the circumstances we do not find it necessary to answer the second question (see *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56, FC, *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, SC, *Pengarah Jabatan Pengangkutan Negeri Selangor & Ors v. Sin Yoong Ming* [2015] 1 CLJ 1; [2015] 1 MLJ 1, FC; *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949; [2014] 4 MLJ 64, FC].

[73] In the result and for the reasons we have given the plaintiff's appeal is dismissed with costs.

[74] The decisions and orders made by the courts below are affirmed.